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THE DEPARTMENT OF THE TREASURY

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United States Court of International Trade

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New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 92-17)

INDUSTRIAL QUIMICA DEL NALON, S.A., AS SUCCESSOR TO ASTURQUIMICA, S.A., PLAINTIFF *v.* UNITED STATES, C. WILLIAM VERITY, SECRETARY OF COMMERCE, JAN MARES, DEPUTY ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION, AND WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, DEFENDANT

Court No. 88-07-00492

MEMORANDUM OPINION AND ORDER

[Plaintiff's request for a third remand to ITA for an adjustment for technical services is granted.]

(Dated February 28, 1992)

Kaplan, Russin and Vecchi (*Dennis James, Jr.* and *Kathleen F. Patterson*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Jane E. Meehan*), (*Dianne McDevitt*, Attorney-Advisor, U.S. Department of Commerce, Of Counsel) for defendants.

I. INTRODUCTION

MUSGRAVE, *Judge*: This case is before the Court for the third time, following a second remand to the International Trade Administration (ITA or Commerce) pursuant to the decision in Slip Op. 91-43, *reprinted at* 15 CIT ____, (1991). On remand, the Court directed Commerce to determine whether the claimed technical service adjustment was valid, and also directed Commerce to adjust the dumping margin for travel expenses and invoice processing.

Commerce filed the "Results of Redetermination Pursuant to Court Remand" (Redetermination Results) with the Court on September 10, 1991. Commerce correctly adjusted the dumping margin for the travel and invoice processing expenses, and denied plaintiffs claim for technician salaries due to lack of supporting documentation. Plaintiff Industrial Quimica Del Nalon (IQN) asks this Court to remand the case once again with instructions to adjust the dumping margin for technician's salaries. Defendant asks that the Redetermination Results be sustained.

II. TECHNICAL SERVICES ADJUSTMENT

The Court directed Commerce to determine from trip reports and other work product whether IQN's claim of all of one technician's time

and one half the time of another, was valid. If ITA determined the claim was valid, it was ordered to adjust the IQN dumping margin. Commerce determined that the documentation did not support the technical service expense because the documents on the record account for only a portion of the two technicians' time. ITA asked IQN to point out instances in the record which would support IQN's claim, but rejected new information which IQN submitted. IQN referred ITA to the two technicians' affidavits.

The ITA found that "an indeterminant portion" [sic] of the services were performed to promote goodwill, referring to portions of the affidavits which mentioned work performed to enhance future sales to potential customers. Plaintiff argues that the technicians performed work for their client's customers, at the request of IQN's clients, not to promote future sales from IQN to those customers. The work should be treated as a selling cost, according to IQN. Commerce denied the adjustment under *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 592 F. Supp. 1318 (1984) and *L.M.I.-La Metalli Industriale, S.p.A. v. United States*.[1] Commerce could not determine the amount of time spent by IQN technicians to benefit sales made during the review period.

III. New Information Rejected by ITA

This Court ordered that "ITA shall grant an adjustment for technical service expenses incurred by Industrial Quimica Del Nalon (IQN) in support of home market sales of potassium permanganate (PP), *provided IQN can document* that the two technicians performed such services one hundred percent and fifty percent of the time, respectively." Amended Order, dated June 12, 1991, at 1 (emphasis added). Commerce would not allow IQN to submit any additional information to support the technical services claim. Pub. Doc. 2. Plaintiff argues that ITA should not have excluded the documentation. The Court agrees.

The Court has discretion to order ITA to reopen the record for additional input. *Saudi Iron & Steel Co. (Hadeed) v. United States*, 11 CIT 880, 893, 675 F. Supp. 1362 (1987). In this case the intent was to allow the ITA "maximum administrative flexibility," *PPG Industries, Inc. v. United States*, 15 CIT ____, ____ F. Supp. ____, Slip Op. 91–112, at 9 (December 13, 1991), with the hope that ITA *would* allow further information to be submitted if IQN could not substantiate its claim with the information on the record. In other cases, ITA has opened and reopened the record on its own initiative on remand. *Freeport Minerals Co. v. United States*, 4 Fed. Cir. (T) 16, 17, 776 F.2d 1029 (1985); *Timken Co. v. United States*, 7 CIT 319 (1984). The Court cannot understand why ITA would keep the record closed in this remand. Although the Court's order did not expressly state that ITA should open the record, ITA was not supposed to ignore information IQN submitted. The Amended Order

[1] 13 CIT 305, 712 F. Supp. 959 (1989), *aff'd in part and rev'd in part on other grounds, L.M.I. La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455 (Fed. Cir. 1990). ITA originally cited these cases in the first determination to deny IQN's technical services adjustment.

states that ITA *shall* grant the adjustment provided IQN *can document* its claim. ITA did not, because IQN was not allowed to provide the requisite information.

Commerce must allow IQN a fair chance to substantiate its claims for a technical services adjustment. Therefore, another remand is necessary for ITA to reopen the record in this case to allow IQN to support its claim with new documentation not now on the record. If, after reviewing the new material, IQN can properly document its claim, then ITA shall grant the adjustment.

IV. Conclusion

As a result, this case is remanded to the International Trade Administration for redetermination in accordance with this opinion.

(Slip Op. 92–18)

Nissho Iwai American Corp., plaintiff *v.* United States, defendant

Court No. 86–11–01439

Amended Opinion and Order

[Plaintiff challenges method of determining value of assembled subway cars imported from Japan for use in New York City subway system. *Held:* Plaintiff's motion for summary judgment is denied, because the contract which caused the subway cars to be imported was the contract between plaintiff and the New York purchaser. Government's cross-motion for summary judgment and counterclaim is granted as amended.]

(Decided February 28, 1992)

Sharretts, Paley, Carter & Blauvelt, P.C., (*Ned H. Marshak* and *Peter Jay Baskin*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*John J. Mahon*) for defendant.

I. Introduction

Musgrave, *Judge:* Plaintiff Nissho Iwai American Corporation ("Nissho American" or "NIAC") moves for summary judgment for reliquidation of certain entries of 205 R-62 subway cars imported from Japan for use in the New York City subway system. The government cross-moves for summary judgment. This opinion amends and replaces Slip Opinion 91–114, issued December 20, 1991.

The parties agree that the R–62 subway cars should be appraised according to their transaction value, as defined in 19 U.S.C.

§ 1401a(b)(1).[1] The dispute arises over whether to value the cars according to the contract price between the New York City Metropolitan Transportation Authority ("MTA"), the U.S. purchaser, and NIAC, or the price paid by plaintiff's corporate parent, Nissho Iwai Corporation ("Nissho Japan" or "NIC") to the primary manufacturer of the cars, Kawasaki Heavy Industries ("Kawasaki" or "KHI"). Alternatively, the government counterclaims for allegedly improperly deducted elements of value, including commissions paid to NIAC, financing costs and insurance costs.

Plaintiff has not overcome the presumption of correctness attaching to Custom's valuation. 28 U.S.C. § 2639(a)(1) (1991). Because the contract which most directly caused the merchandise to be exported to the U.S. was the contract between the MTA and Nissho American, the Regional Commissioner of Customs correctly based transaction value on the contract price between MTA and NIAC. The government's cross-motion for summary judgment and counterclaim is granted as amended and plaintiff's claims for commissions, financing and insurance costs are denied.

II. Factual Background

Plaintiff contracted with the MTA to deliver three hundred and twenty-five R-62 subway cars (the "Master Contract").[2] The MTA agreed to pay $844,500.00 per car ($889,391.00 per car after escalation charges and change orders), including freight, insurance, and customs duties.[3] Kawasaki and NIC worked together on the bid proposal, and KHI participated in the negotiations with MTA. The contract negotiations took place in the United States, and the contract was signed in New York City on March 17, 1982. Kawasaki signed a warranty of performance to MTA and NIAC on the same day.[4] The Master Contract

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[1] 19 U.S.C. § 1401a(b) provides in part:

(1) The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to—

(A) the packing costs incurred by the buyer with respect to the imported merchandise;
(B) any selling commission incurred by the buyer with respect to the imported merchandise;
(C) the value, apportioned as appropriate, of any assist;
(D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and
(E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

19 U.S.C. § 1401a(b) (1991).

[2] Equipment Contract R-31462 (R-62) (Revised) between Metropolitan Transportation Authority and Nissho Iwai American Corporation.

[3] Master Contract, Articles VII, VII-A(a)(1), at 8.

[4] Master Contract, Appendix H, provides:

KAWASAKI HEAVY INDUSTRIES, LTD., a Japanese corporation ("KAWASAKI"), hereby represents and covenants:

1. KAWASAKI has received a complete copy of the foregoing Contract, is fully and completely aware of all provisions of the Contract and consents to be named as car builder as provided in Article VI-C.
2. KAWASAKI has the necessary facilities, skill and experience and ample financial resources to perform the obligations of car builder as a subcontractor to Contractor (or its assignee) under the Contract.
3. KAWASAKI expressly stipulates that with respect to its performance *all work shall strictly comply with all requirements of the Contract.*
4. *KAWASAKI guarantees to Contractor and MTA* that the passenger cars shall be fit for their respective intended uses and free of all defects for the applicable periods set forth in Article XXXI of the Contract Terms and Conditions.

Master Contract, Appendix H (emphasis added).

gave Nissho American the right to assign the contract to Nissho Japan[5], which NIAC did the same day as it signed the Master Contract. Nissho American is a wholly-owned subsidiary of Nissho Japan. Risks of changes in duty rates, taxes and currency fluctuations were borne by NIC.[6]

The Master Contract designated Kawasaki as the primary car builder[7] and specified that the cars would be manufactured using both U.S. and Japanese components.[8] Article XVII gave the MTA control over selection of subcontractors, while Article XVII(e) applied all the contract terms to any subcontractor. By the terms of the Master Contract, NIC was bound to select U.S. manufacturers for the propulsion and brake systems. These components were shipped by NIC to Kawasaki which incorporated them in the cars as they were built. NIAC was responsible for any damages or injury during transit and during repairs at the MTA.[9]

Nissho Japan and KHI agreed on March 23, 1983 that each car would cost NIAC approximately ¥80 million upon delivery F.O.B. Kobe, Japan (the "Side Agreement"). Nissho Japan and KHI agreed to be jointly responsible for the quality of the cars. Kawasaki was responsible for obtaining MTA's approval of the cars on delivery, and providing technical assistance (testing, manuals, training) after delivery.[10] KHI also provided warranty service, including a service engineer, in New York until August, 1990.[11] When the Side Agreement was signed, NIC owned .23 percent of KHI, and KHI owned .089 percent of NIC.[12] The Side Agreement was signed in Japan.

The cars were built and delivered as planned. The first one hundred and twenty cars were entered by NIAC at the KHI-NIC sales price.[13] Customs liquidated the last two hundred and five cars at the MTA-NIAC price, at a net dutiable value of $497,737.61 for cars entered in 1983 (8.9 percent duty rate), $500,495.16 for cars entered in 1984 (8.3 percent duty rate), and $503,751.17 for cars entered in 1985 (7.6 percent duty rate).[14] Nissho American protested those entries, which are now before the Court. When it entered the cars at issue here, NIAC also paid $884,655.99 in additional duties claimed for the cars liquidated at the

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[5] Master Contract, Art. VI–A

[6] Plaintiff's Brief in Support of Summary Judgment, fn. 3, at 11.

[7] Master Contract, Art. VI–C provides:
Kawasaki as Car Builder. The Contractor represents that the passenger cars to be furnished hereunder will be manufactured and produced by Kawasaki Heavy Industries, Ltd., Japan.

[8] The Master Contract estimated that the content of the cars would be 57.45 percent Japanese, and 42.55 percent American-made components. Master Contract, Art. VII–A(c), at 10.

[9] Master Contract, Art. XIV (a).

[10] Defendant's Statement of Additional Material Facts Not In Issue, para. 8, at 4

[11] *Id.* at 5.

[12] KHI never owned more than one per cent of NIC, and vice versa. Plaintiff's Brief, at 10.

[13] Plaintiff's Statement of Material Facts as to Which There is no Genuine Issue to be Tried, para. 31, at 5–6.

[14] *Id.*, para. 32, at 6.

KHI-NIC price. The government has abandoned its claim for the additional duties on the prior entries.

III. Discussion

On a motion for summary judgment, the Court must determine whether there are any material factual issues which remain to be decided. *Brosterhous, Coleman & Co. v. United States*, 14 CIT ___, ___, 737 F. Supp. 1197,1199 (1990). If there are no material facts at issue when ruling on cross-motions for summary judgment, the Court must decide whether either party has demonstrated that it is entitled to judgment as a matter of law. *Id.* There may be no genuine issues of material fact in dispute, as the Court cannot try issues of fact. *Carter Footwear v. United States*, 10 CIT 618 (1986); Wright, Law of Federal Courts § 99 at 664 (4th ed. 1983) (court may only determine whether there are issues to be tried). Summary judgment may be inappropriate where the parties agree on the basic facts, but disagree about the factual inferences to be drawn from those facts; if reasonable minds differ on the inferences arising from undisputed facts, then the Court should deny summary judgment. *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695 F.2d 1294,1296–97 (11th Cir. 1983); *Mitsui Foods, Inc. v. United States*, 12 CIT 276, 278, 688 F. Supp. 605, 606 (1988), *aff'd*, 7 Fed. Cir. (T) 36, 867 F.2d 1401 (1989). The party against whom the motion is made is entitled to all the favorable inferences that may be reasonably drawn from the evidence, and if when so reasonably viewed reasonable minds might reach different conclusions, the motion should be denied. *Caylor v. Virden*, 217 F.2d 739 (8th Cir. 1955).

On the facts before the Court, no material facts are at issue. The primary disagreement between the parties arises over whether the statutory transaction value should be based on the price paid by NIC to KHI or on the price set in the Master Contract between NIAC and MTA.

The Customs Service's valuation of the merchandise is entitled to a presumption of correctness,[15] and Customs' interpretation of its regulations will be accepted if it is "sufficiently reasonable." *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981). Customs rulings should be given the deference to which they are entitled. *Texas State Comm. for Blind v. United States*, 796 F.2d 400, 406 (Fed. Cir. 1986) (*citing United States v. Turkette*, 452 U.S. 576, 580 (1981)); *Julius Goldman's Egg City v. United States*, 697 F.2d 1051, 1055 (Fed. Cir. 1983) (deferential standard applies to review of agency's interpretation of its regulations).

A. *Brosterhous, Coleman & Co. v. United States:*

In *Brosterhous, Coleman & Co. v. United States*, an American manufacturer contracted with a West German firm to construct a chlorine dioxide bleach plant in the United States. The contract did not specify which subcontractors should be used and the foreign seller decided to

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[15] 28 U.S.C. § 2639(a)(1).

use foreign components. *Brosterhous* held that "[w]hen there is more than one sale for exportation, Customs policy is that transaction value should be calculated according to the sale which most directly caused the merchandise to be exported to the United States." *Brosterhous*, 737 F. Supp. at 1199. The transaction value was the price the foreign seller paid for the components, rather than the contract amount, because the foreign seller was free to buy from any supplier, and *could* have fulfilled the contract by using only U.S. suppliers. *Id.* Because the foreign seller was not obligated to buy from abroad, the contract with the U.S. customer did not primarily cause the goods to be exported to the United States.

The operative facts in this case are directly contrary to *Brosterhous*. The MTA negotiated with NIAC on the express understanding that Kawasaki would build the cars. The Master Contract specified Kawasaki as the "primary builder." NIC/NIAC was *not* free to pick its supplier. It was obligated to buy from abroad. Following the *Brosterhous* analysis, the Master Contract was the contract which most directly caused the goods to be exported to the United States.

B. *E.C. McAfee v. United States:*

Plaintiff argues that *E.C. McAfee v. United States*, 6 Fed. Cir. (T) 92, 842 F.2d 314 (1988), should compel this Court to value the R–62 cars at the KHI-NIC price. In *McAfee*, U.S. customers ordered suits from Hong Kong distributors in the U.S., who then contracted with Hong Kong tailors to assemble the suits from fabric supplied by the distributor and trim supplied by the tailors. A freight forwarder entered the suits through Customs and shipped them to customers. *McAfee* held that the suits were dutiable at the price paid by the Hong Kong distributor to the Hong Kong tailors rather than the price paid by the U.S. customer.

McAfee followed two key holdings in *United States v. Getz Bros. & Co.*, 55 CCPA 11, C.A.D. 927 (1967), where the issue was whether imported plywood should be valued at the manufacturer's price to a foreign middleman, or at the price between the foreign middleman and the U.S. customer. *Getz* held that foreign sales could provide a basis for valuation, and that if the transaction between the manufacturer and the foreign middleman fell within the statutory provision for valuation, the manufacturer's price, rather than the price from the middleman to his customer, should be used for appraisal. *McAfee*, 6 Fed. Cir. (T) at 97, 842 F.2d at 318, *citing Getz*, 55 CCPA at 18.

However, the *Getz* case did not involve an agreement where essentially all three parties, customer, middleman and manufacturer, agreed to a price for the goods. *Getz* involved two distinct transactions, with little or no contact between the actual supplier and the final customer. *McAfee* also involved a three-tier distribution process, with only the middleman having contact with both the tailors and the customers. There were several different levels of agreement, between the U.S. customer and the foreign middleman, between the foreign middleman and the U.S. importer, and between the middleman and the tailors.

C. *The Master Contract Was In Effect An Agreement Between MTA, NIC and KHI:*

In the case at bar, there is no need to pick between several different layers of contracts to determine the export-causing agreement. The Master Contract controlled the entire transaction. It was the transaction which most directly caused the export to the United States. Without it, no export would have taken place. All three parties to the transaction agreed to follow its terms. The Side Agreement depended on the Master Contract not only for subject matter, but also for many of its terms. Without the Master Contract, the Side Agreement would be a nullity.

The determination of which sale is for exportation should be made on a case-by-case basis. *McAfee*, 6 Fed. Cir. (T) at 98, 842 F.2d at 319. A clear understanding of the Master Contract shows that the facts are decidedly different from *McAfee*, although a more doctrinaire reading of the contract in the context of the *McAfee* case might come to a different conclusion. The true nature of the transaction is revealed by the extensive involvement of KHI from the very beginning, and requires the valuation of the R-62 cars at the Master Contract price.

The Master Contract was above all a manufacturing contract. Kawasaki and NIC worked together on the bid proposal. MTA negotiated with both KHI and Nissho American after the NIAC/KHI bid was selected. All three knew what responsibilities each would have under the contract from the very beginning. The Master Contract designated Kawasaki as the manufacturer, established the specifications which controlled Kawasaki's manufacturing, vested approval of all KHI's subcontractor's in the MTA, and provides for control of value content in the MTA.[16] As described by the government,

> the facts in this case demonstrate that the MTA purchased the R-62 vehicles in issue from NIAC/NIC with the understanding and requirement that they would be comprised of 57.45% [Japanese] components and 42.55% of [U.S.] components, and that KHI would assume the responsibilities * * * regarding technical matters and specifications both before and after the delivery of the vehicles to the United States. They also demonstrate that NIC and KHI negotiated prices with a view toward what the final MTA purchase price would be and entered into agreements as to their joint responsibilities regarding the performance of the MTA master contract and the securing of the U.S. components of the vehicles. They also demonstrate that KHI's role was not merely that of an assembler who assembled components in which it had no interest. Rather, it fabricated the R-62 vehicles from Japanese components which it owned and the U.S. components which NIC owned and was paid by NIC for its work in fabricating the vehicles and for the technical re-

[16] *See*, respectively, Master Contract Art. VI–C, Appendix E, Art. XVII, and Art. VIII–A.

sponsibilities it had agreed to provide both before and after delivery of the vehicles [to] the United States.[17]

Although Kawasaki was not a signatory to the Master Contract, the arrangements made show that it was excluded in only the formal sense of the contract. Kawasaki was pre-selected by the MTA as manufacturer before the Master Contract was signed. Its name appears several times in the contract, and it had rights and duties according it a major role in the contract. There were face-to-face meetings between KHI and the MTA. Kawasaki signed a warranty of performance to both the MTA and NIAC, and agreed to abide by the terms of the Contract. It was, at the very least, a third-party beneficiary named explicitly in the Master Contract.[18]

Nissho Japan supplied KHI with American-made components which made up over 42 percent of the value of the cars. While this does not *require* a different result from *McAfee*, it shows the fundamental differences between the two cases. In *McAfee*, the American customer agreed to buy a 100 percent imported suit. In this case, the MTA agreed in the Master Contract to buy cars that were 57 percent Japanese and 42 percent American. The commingling of American-made parts into foreign-made cars muddies the clear waters of the *McAfee* holding. The Court of Appeals for the Federal Circuit valued the *McAfee* transaction between the assembler and the middleman. It had a choice between two discrete transactions. Here the Court is presented with a manufacturer which has dealt extensively with the U.S. customer, and a secondary contract which seems more like an afterthought than a true arms-length transaction. The result is that the case differs greatly from *McAfee*.

The Side Agreement followed the Master Contract by more than a year, and incorporates terms which by their nature show that they were not relying on it to control their actions.[19] The negotiations with American vendors had been over for six months by the time the Side Agreement was signed.[20] Manufacture of the cars may have already started, as the first production cars were scheduled to be delivered nine months after the Side Agreement was signed.[21] Nissho Japan's and Kawasaki's delay in signing the Side Agreement show that it was not the contract which directly caused the exportation.

The Side Agreement was made "*in accordance with* the Main Contract,"[22] and was subordinate to the Master Contract. The Master Con-

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[17] Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment, at 7–8.

[18] The evidence shows that MTA knew all along that it was dealing with KHI. For example, an internal MTA memo characterizes NIAC as "representing Kawasaki Heavy Industries." Defendant's Exhibit 3, at 1. The same document later referred to the two together, as "Nissho-Iwai/Kawasaki."

[19] For example, NIC was to pay KHI ten percent of the contract price "within one month after the effective date of the [Master Contract.]" Side Agreement, Art. 4(1)(a), at 4. However, the Side Agreement was signed more than eleven months *after* the effective date of the Master Contract.

[20] *See*, Plaintiff's Exhibit 3, at 12.

[21] Master Contract, Art. X(a)(2).

[22] Side Agreement, at 1 (emphasis added).

tract included all the terms and specifications necessary for the manufacture and export of the cars. The Side Agreement controlled the relationship between KHI and NIC only where the Master Contract was silent. The Side Agreement would remain in effect only until NIC completed performance under the Master Contract.[23] It controlled the cars only up to the point where they were delivered to NIC at the port of Kobe, Japan. It did not compel NIC to then export them.[24] This is substantially different from *McAfee*, where there were no meetings or consultations between the US. customer and the tailors, and the tailors were not chosen until after the contract was made with the ultimate buyer.

D. *McAfee Valued "Assembled Merchandise":*

The case at bar involves manufactured goods, not assembled merchandise, within the meaning of Customs Regulation 19 C.F.R. § 152.103,[25] and to the extent that *McAfee* involved "assembled merchandise," it is inapplicable here. Kawasaki provided its own raw materials for the Japanese portion of the cars. As manufacturer rather than assembler, KHI had an interest in the merchandise other than as an assembler under § 152.103(a)(3). Kawasaki also provided significant technical support and warranty service after delivery.

The *McAfee* Court framed the questions before it as "whether the custom-made clothing is assembled merchandise within the meaning of the regulation and, if so, whether the transaction value of the merchandise should be determined on that basis,"[26] although it held that the transaction value should be based on the actual price paid rather than the assembly price. But the tailored suits were assembled from supplied components, and the fact that the KHI manufactured the subway cars in large pan from scratch is a significant distinction between the *McAfee* export transaction and the Master Contract.

E. *Nissho Japan and Kawasaki Are Not Partners:*

The government claims that KHI and NIC were partners because KHI was named as the primary car builder in the Master Contract, and because KHI had joint responsibilities and liabilities with NIC under the contract. The two parties interacted considerably. They agreed to divide unforeseen or disputed profits and losses, to share in the selection of U.S. subcontractors and to concur on the price for U.S.-built components, among other things.[27] The government argues that they were

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[23] Defendant's Response to Plaintiff's Statement of Material Facts Not in Issue, para. 11, at 2.

[24] Although plaintiff argues that the cars were destined for export by their very design, this can be turned around: the design specifications for the cars was found in the Master Contract, not the Side Agreement.

[25] 19 C.F.R. § 152.103(a)(3) provides:

> *Assembled merchandise*. The price actually paid or payable may represent an amount for the assembly of imported merchandise in which the seller has no interest other than as the assembler. The price actually paid or payable in that case will be calculated by the addition of the value of the components and required adjustments to form the basis for the transaction value.

19 C.F.R. § 152.103(a)(3) (1991).

[26] *McAfee*, 6 Fed. Cir. (T) at 95, 842 F.2d at 317.

[27] Side Agreement, Articles 7(1), 11(5) and 20.

therefore "related parties" under 19 U.S.C. § 1401a(g), and that there was no sale for exportation between KHI and NIC.

Nissho Japan and KHI agreed to allocate windfall profits and losses in the Side Agreement, but their interaction did not constitute a partnership or joint venture to produce the cars under 19 U.S.C. § 1401a(g)(1)(D) (1991). Kawasaki and NIC did not share overall profits or losses on the project, or pool their resources or expertise. Each handled its own area of responsibility as laid out in the Master Contract: Kawasaki manufactured, and Nissho Japan administered.

Nissho Japan and Kawasaki each owned no more than one percent of the other, so they were not "related parties" within the meaning of the cross-ownership provisions of 19 U.S.C. § 1401a(g)(1)(F) (1991). Their involvement does tend to show that the agreements between NIC and KHI were of a different nature from the foreign transactions in either *Getz* or *McAfee*.

F. *Commissions Paid to NIAC:*

The government moves to have commissions paid to NIAC by NIC declared dutiable. The payments were made to reimburse NIAC for the cost of shipping the U.S.made components to Japan. Customs deducted $6569.00 per car as a deduction from dutiable value at liquidation.

The government correctly points out that in order to qualify for a deductible buying commission, there must be an agency relationship.[28] Although NIAC is a subsidiary of NIC, it is not necessarily its agent for the purposes of purchasing and shipping the U.S.-made parts. NIAC and NIC explicitly agreed that NIAC would be an independent contractor "and shall not be deemed to be an agent or employee of NIC for any purpose whatsoever."[29] Of course, if there was an agency relationship between the two, it was terminated by that agreement. Restatement 2d, Agency, §§ 118–119 (1958) (authority created in any manner terminates when either party manifests to the other its intention to end the agency authority). Because NIAC was not NIC's agent, the commissions are not entitled to be deducted from dutiable value.[30]

G. *MITI Insurance:*

NIAC also claims a deduction for export credit insurance provided by the Japanese Ministry of International Trade and Industry (MITI). This protected NIAC against the chance that MTA might default on its obligations. The government points out that insurance must be an expense incident to the international shipment of goods, under 19 U.S.C. § 1401a(b)(4)(A) (1991). The insurance did not protect NIAC against loss while in transit, but rather against the possibility that MTA might

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[28] *Rosenthal-Netter, Inc. v. United States*, 12 CIT 77, 679 F. Supp. 21 (1988), *aff'd, adopted Rosenthal-Netter, Inc. v. United States*, 7 Fed. Cir. (T) 11, 861 F.2d 261 (Fed. Cir. 1988) (where there was no agency relationship, commissions and handling charges were dutiable).

[29] Agreement to Acquire and Sell [U.S.-made components] between NIC and NIAC, Article 12, at 6–7, Defendant's Exhibit J.

[30] *Rosenthal-Netter*, 12 CIT at 78–79, 679 F. Supp. at 23.

breach its contract. The Court agrees with the government that the insurance is not properly allowable as a deduction from transaction value.

H. *Escalation and Change Order Payments:*

Customs included escalation and change order payments to NIC's American subcontractors in the value allowed under item 807.00 TSUS for United States components. The government now concedes that those charges were correctly deducted from the value of the cars. Defendant's Response to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment, at 9.

IV. Conclusion

Because the Master Contract was the contract which caused the exportation to the United States, the government's motion for summary judgment is granted. The Regional Commissioner of Customs is ordered to reliquidate the R-62 subways cars at the price paid by the MTA to NIAC, minus applicable deductions as set forth and as conceded by the government in its briefs. The government's cross-motion for summary judgment and counterclaim as amended is granted.

(Slip Op. 92–19)

Turbon Products, Inc, plaintiff *v.* United States, defendant

Court No. 89–06–00325

Memorandum Opinion and Order

[Plaintiff moves for reconsideration of scheduling order setting matter for trial in New York City, in favor of Philadelphia. *Held:* Plaintiff's motion is denied as factors favoring trial in New York outweigh factors favoring trial in Philadelphia.]

(Dated February 28, 1992)

Stein Shostak Shostak & O'Hara, Los Angeles (*Robert Glenn White*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*James A. Curley*), for defendant.

Musgrave, *Judge*: This Court entered a scheduling order in this case on December 17, 1991, which set a trial date of June 9, 1992. Plaintiff had informally requested that trial be set for Philadelphia, because its witnesses and much of its evidence are located nearer to Philadelphia than to New York City. Plaintiffs request was denied.

Plaintiff now formally moves this Court to reconsider its decision to set trial for New York City. Plaintiff contends that the statutory scheme provides "equal access to its justice by all importers throughout this na-

tion" and that where "there are no unusual problems that override the statutory scheme * * * trial in the district of entry should be the rule, not the exception." Plaintiffs brief, at 4–5.

Court of International Trade Rule 77(c)(2) states the "Chief Judge *may*, as authorized by 28 U.S.C. §§ 253(b) and 256(a), designate the place and date of any trial or hearing to be held at * * * any place other than New York City within the jurisdiction of the United States." USCIT, Rule 77(c)(2)(1991) (emphasis added).

Although plaintiff cites *Shannon Luminous Material Co. v. United States*, 69 Cust. Ct. 317, 349 F. Supp. 1000 (1972), that case is unconvincing. Plaintiff in *Shannon Luminous Material* claimed that it had a constitutional right to choose where trial should be held. *Id.*, at 317, 349 F. Supp. at 1002. The Court held that the determination of venue of an action is not vested in a party as a constitutional right. *Id.*, at 319, 349 F. Supp. at 1003. On rehearing, former Chief Judge Boe did allow evidentiary hearings to be held in Los Angeles after plaintiff submitted information concerning the availability of witnesses who were essential to plaintiff's case. *Shannon Luminous Material Co. v. United States*, 70 Cust. Ct. 319, 320, C.R.D. 73–1 (1973).

The government cites the more recent case of *Zoltek Corp. v. United States*, 13 CIT 1098, 728 F. Supp. 762 (1989), where former Chief Judge Re outlined several factors which inform the discretion of the Chief Judge in deciding whether to set a trial outside of New York. Those factors include, *Id.*, at 1102, 728 F. Supp. at 764–65:

1. The procedural posture of the case. This case has proceeded expeditiously from filing to scheduling of a trial unlike the *Zoltek* case. *Id.*, 13 CIT at 1104–05, 728 F.Supp. at 766 67 (premature request for trial at outport apparently filed in lieu of motion for extension of time).

2. The question presented, and whether the issues in dispute are of fact or law. The questions presented have not been completely framed, although in classification cases the questions will more likely be factual than legal.

3. The availability and convenience of the witnesses of both parties. If there is a trial, plaintiff's two witnesses will have to make either an eighty-eight mile journey from York, Pennsylvania to Philadelphia, Pennsylvania, or a 182 mile trip to New York City. Defendant's counsel does not say how many witnesses he plans to call, although he does state that the Customs personnel from Philadelphia, Baltimore and Washington, D.C. "have little or nothing to do with this lawsuit and are not expected to testify." Defendant's opposition, at 2. Defendant's counsel states only that "the trial witnesses are located in New York City." *Id.* Presumably that means that government counsel plans to call more than one witness.

4. The availability of a courtroom at the requested place of trial. It is difficult to predict whether there would be a courtroom available in Philadelphia five months from now. See *Zoltek*, 13 CIT at 1104, 728 F. Supp. at 766.

5. The availability of alternate means to obtain the evidence and testimony that may be presented outside of New York City. Plaintiff's witnesses' testimony could be recorded in a videotaped deposition, or they could testify over the phone, but both could reduce the ability of the trier of fact to judge their credibility. Plaintiff has not presented the Court with compelling reasons to resort to the use of alternative methods for obtaining testimony.

6. The importance and relevance of the port of importation. The parties are split on the importance of the port of importation. It has been the Court's experience that the port of importation is often unimportant in the determination of factual issues in classification cases.

7. The cost to the parties and the Court. Given the distance between York and Philadelphia, it is likely that plaintiff's witnesses would have to spend the night in Philadelphia even were the trial to be held there. Therefore, the added expense of travel to New York and housing the witnesses in New York would be incremental It is clear that the costs of transporting and housing the Court's personnel, the government attorney and his witnesses would likely outweigh the added financial burden to plaintiff's two witnesses to travel from York to New York.

Because of these factors, and because plaintiff has not shown the Court a compelling reason for setting the trial in Philadelphia which overcomes these concerns, plaintiff's motion for reconsideration is DENIED.

(Slip Op. 92–20)

UNITED STATES, PLAINTIFF *v.* YOEL NEMAN, DEFENDANT

Court No. 89–03–00146

[Defendant moves for partial summary judgment on one entry for failure to bring the action within five years "of the date upon which the action should have been brought," under 19 U.S.C. § 1621. *Held:* Defendant's motion is denied.]

(Dated February 28, 1992)

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*. Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Anthony H. Anikeeff*), (*Carla Anderson Johnson*, Assistant Regional Counsel, U.S. Customs Service, Of Counsel) for plaintiff.

Yoel Neman, *pro se*, for defendant.[1]

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1 Defendant was represented by counsel until May 23, 1991.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

MUSGRAVE, *Judge*: This case comes before the Court on defendant's motion for partial summary judgment. The government seeks to recover penalties from Yoel Neman for an allegedly fraudulent entry of fabric falsely declared as the product of Japan, entered on September 26, 1983. Yoel Neman claims that Entry No. 83–438352–4 should be time barred by 19 U.S.C. § 1621 because the entry was filed on September 26, 1983, more than five years from the filing of the complaint.[2] The government argues that the claim is not barred because the statute of limitations for fraudulent entry claims is five years from the date of discovery.[3] Defendant's motion is denied because significant questions of fact remain, and this matter is inappropriate for summary judgment.

II. FACTS

On March 14, 1984, a Customs Service officer first noticed allegedly falsely marked goods imported by Pacific Textile Co. (Pacific), the importer of record for Entry No. 83–438352–4. Plaintiff's Statement Pursuant to Rule 56(i), at 1, Declaration of Dennis Shintani, at § 4. Customs initially discovered the involvement of Yoel Neman and the alleged fraudulent declaration of Entry No. 83–438352–4, on May 4, 1984. The action was filed on March 14, 1989.

III. SUMMARY JUDGMENT

On a motion for summary judgment, there may be no genuine issues of material fact in dispute. *Carter Footwear v. United States*, 10 CIT 618 (1986); Wright, Law of Federal Courts § 99 at 664 (4th ed. 1983) (court may only determine whether there arc issues to be tried). The party against whom the motion is made is entitled to all the favorable inferences that may be reasonably drawn from the evidence, and if when so reasonably viewed reasonable minds might reach different conclusions, the motion should be denied. *Caylor v. Virden*, 217 F.2d 739 (8th Cir. 1955).

In the instant case, the question of when the allegedly fraudulent activity was discovered remains to be decided. Under 19 U.S.C. § 1621, a § 1592 fraud case must be brought "within five years after the time when the alleged offense was *discovered*." 19 U.S.C. § 1621 (1991) (emphasis added). Defendant argues that the government should have known of its alleged conduct "on, or shortly after, the date of the subject entry." Defendant's Memorandum in Support of Motion for Partial Summary Judgment, at 1. Defendant's argument misses the mark.

Two prior cases are on point. In *United States v. R.I.T.A. Organics, Inc.*, 487 F. Supp. 75 (N.D. Ill., 1980), the defendant argued that the Customs Service knew more than five years before the suit was brought that the import documents were false. However, the Court denied summary

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[2] This opinion only addresses Entry No. 83–438352–4.

[3] 19 U.S.C. § 1592 (1991).

judgment because material factual issues remained. "The question of when a plaintiff discovered or reasonably should have discovered a fraud is not one which often lends itself to resolution by way of summary judgment." 487 F. Supp. at 78. In a later case, this Court denied defendant's motion to dismiss on similar grounds. *United States v. Gordon*, 7 CIT 350 (CIT 1984).

Drawing all inferences in the government's favor and giving the government's affidavit the weight it is due, the unrebutted evidence shows that the government did not discover the alleged fraud until March 14, 1984. Defendant's motion must be denied because there remains, at least, a material fact at issue, i.e., when the alleged fraud was discovered.

IV. Conclusion

After examining the evidence and law presented to support the motion for partial summary judgment, this Court believes that the factual issue of when the Customs Service discovered the alleged fraud remains to be decided. For this reason, defendant's motion for partial summary judgment is Denied.

(Slip Op. 92–21)

Torrington Co., plaintiff *v.* United States, defendant, SNR Roulements, SNR Bearings, USA, Inc. and ICSA Industries Cuscinetti S.p.A.; INA Bearing Co., Inc. and INA Walzlager Schaeffler KG; GMN Georg Muller Nurnberg AG; SKF USA, Inc., AB SKF, SKF GmbH and SKF Gleitlager GmbH; Caterpillar, Inc.; Fag Kugelfischer Georg Schaefer KGaA and Fag Bearings Corp.; Hugo Finkenrath OHG, defendant-intervenors

Court No. 89–06–00359

Plaintiff contests the finding by the Department of Commerce, of five classes or kinds of merchandise in an investigation of antifriction bearings from Germany. Plaintiff also asserts that the ITA improperly terminated cost of production investigations and wrongly excluded split pillow block housings from the scope of the investigations.

Held: As a matter of law, the ITA possesses the authority to modify the petition's description of class or kind and the determination in this action is supported by substantial evidence in the record and is otherwise in accordance with law.

The ITA applied the correct standard in its consideration of whether to terminate the cost of production investigations in this case and the decision to terminate is supported by substantial evidence. Further, the decision to exclude pillow block housings from the scope of the investigations was in accordance with law.

[ITA determination as to Counts 1, 2 and 18 of plaintiff's Complaint is affirmed.]

(Dated February 28, 1992)

Stewart and Stewart (*Eugene L. Stewart*, *Terence P. Stewart*, *James R. Cannon, Jr.*, *Wesley K. Caine*, *David Scott Nance* and *William A. Fennell*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeanne E. Davidson*); of

counsel: *John D. McInerney*, Senior Counsel, *Douglas S. Cohen*, *Craig R. Giesse*, *Diane M. McDevitt*, *Stephanie J. Mitchell* and *Maria T. Solomon*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, Department of Commerce, for defendant.

Donovan Leisure Newton & Irvine (*Pierre F. de Ravel d'Esclapon*) for SNR Roulements, SNR Bearings, USA, Inc. and ICSA Industries Cuscinetti S.p.A.

Arent Fox Kintner Plotkin & Kahn (*Stephen L. Gibson*) for INA Bearing Co., Inc. and INA Walzlager Schaeffler KG.

Grunfeld, Desiderio, Lebowitz & Silverman (*Bruce M. Mitchell*) for GMN Georg Muller Nurnberg AG.

Howrey & Simon (*Paul Plaia, Jr.*, *Herbert C. Shelley*, *Joel D. Kaufman*, *Cecilia H. Gonzalez*, *Alice A. Kipel*, *Lauren D. Frank*, and *Juliana M. Cofrancesco*) for SKF USA, Inc., AB SKF, SKF GmbH and SKF Gleitlager GmbH.

Powell, Goldstein, Frazer & Murphy (*Peter O. Suchman*, *Richard M. Belanger* and *Neil R. Ellis*) for Caterpillar, Inc.

Grunfeld, Desiderio, Lebowitz & Silverman (*Max F. Schutzman* and *David L. Simon*) for FAG Kugelfischer Georg Schaefer KGaA and FAG Bearings Corporation.

Wilmer, Cutler & Pickering (*Leonard M. Shambon*, *Stavros J. Lambrinidis* and *Barbara K. Bracher*) for Hugo Finkenrath OHG.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), brings this action to challenge the final determination of the Department of Commerce, International Trade Administration ("Commerce" or "ITA"), in the antidumping investigation of antifriction bearings from the Federal Republic of Germany ("Germany"). *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany* ("Final Determinations"), 54 Fed. Reg. 18,992 (1989). Pursuant to Rule 56.1 of the Rules of this Court, plaintiff seeks partial judgment upon the agency record regarding that part of the ITA's determination which stated that the petition encompassed five separate classes or kinds of antifriction bearings. Torrington also contests the ITA's decision to discontinue its investigation of the German costs of production and the decision to exclude split pillow block housings from the scope of the investigations.

DISCUSSION

A final determination by the Department of Commerce will be sustained unless that determination is not supported by substantial evidence or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). Under this standard, Commerce is granted considerable deference "in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law." *Chemical Prods. Corp. v. United States*, 10 CIT 626, 628, 645 F. Supp. 289, 291 (1986) (citations omitted).

The Court will not overturn a final antidumping determination merely because the plaintiff "is able to produce evidence * * * in support of its own contentions and in opposition to the evidence supporting the

agency's determination." *Hercules, Inc. v. United States,* 11 CIT 710, 755, 673 F. Supp. 454, 490 (1987). The evidence presented by plaintiff "must be enough to convince the Court that a reasonable mind would not have found ITA's evidence sufficient to support its conclusion." *Torrington Co. v. United States* ("*Torrington I*"), 14 CIT ____, ____, 745 F. Supp. 718, 723 (1990), *aff'd,* 938 F.2d 1276 (Fed. Cir. 1991).

I. *Class or Kind:*

The facts of this case were set out in detail in *Torrington I.* Briefly, while Torrington's petition described the subject merchandise as all ground antifriction bearings (except tapered roller bearings) and parts thereof, the ITA subdivided the merchandise into five classes: ball bearings, spherical roller bearings, cylindrical roller bearings, needle roller bearings and spherical plain bearings. 54 Fed. Reg. at 18,999. Plaintiff claims Commerce does not have the authority to modify the petition's description of "class or kind," but even if it did, its modification is not supported by substantial evidence in the record.

Our appellate court has adjudged that, as a matter of law, the ITA has the authority to subdivide the petition's class or kind description when there is substantial evidence to support the subdivision. 938 F.2d at 1277–78. In the case at bar, plaintiff has attempted to prove that antifriction bearings are one class or kind by showing similarities among the various bearings within the framework of the criteria set forth in *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983).[1] The Court finds that the similarities among the bearings are outweighed by substantial evidence supporting the finding of five classes or kinds. *See Torrington I*, 14 CIT at ____, 745 F. Supp at 723–27. Accordingly, that determination of the ITA is affirmed.

II. *Cost of Production:*

Torrington also claims that the ITA's decision to terminate the investigation of German costs of production ("COP") was not in accordance with law. The Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(b) (1988), provides that, if the ITA "has reasonable grounds to believe or suspect that sales in the home market of the country of exportation * * * have been made at prices which represent less than the cost of producing the merchandise * * *, such sales shall be disregarded in the determination of foreign market value." A cost of production investigation may be initiated at the request of the petitioner if the petitioner files its request in a timely manner and the information supporting the request meets statutory and judicial standards. 19 U.S.C. § 1677b(b); *Al Tech Specialty Steel Corp. v. United States*, 6 CIT 245, 250, 575 F. Supp. 1277, 1282 (1983), *aff'd*, 745 F.2d 632 (Fed. Cir. 1984); *Floral Trade Council of*

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[1] The criteria include the general physical characteristics of the merchandise, the expectations of the ultimate purchasers, channels of trade in which the goods travel, the ultimate use of the product, and its cost or manner of advertising or display. *Id. See also Kyowa Gas Chem. Indus. Co. v. United States*, 7 CIT 138, 140, 582 F. Supp. 887, 889 (1984).
These criteria are codified at 19 U.S.C. § 1677j(d)(1) for scope determinations concerning later developed merchandise.

Davis, Cal. v. United States, 12 CIT 981, 982, 698 F. Supp. 925, 926 (1988).

In its petition, Torrington alleged that sales in the home market of German manufacturers of antifriction bearings ("AFBs") were being made at prices below the cost of production. General Administrative Record ("GAR") (Pub.) Doc. 1 at 102–04. On the basis of the petition's allegations, the ITA initiated an investigation as to the cost of producing AFBs in Germany. The importers objected to the investigation based on the fact that Torrington's allegations relied on a conglomeration of German costs, rather than the company-specific data required by this court in *Al Tech*. Commerce concurred and on July 22, Commerce asked Torrington to supplement its submissions. GAR (Pub.) Doc. 120.

When Torrington's supplements still did not satisfy the statutory and *Al Tech* standards, Commerce discontinued the COP investigations in each of the five classes or kinds of bearings as to all the foreign manufacturers. GAR (Pub.) Doc. 160. Plaintiff contends that the company-specific standard is an overly onerous one which is not consistent with the mandates of the Tariff Act.

In *Torrington Co. v. United States* (*Torrington II*), 15 CIT ____, 772 F. Supp. 1284 (1991), this Court followed the *Al Tech* ruling and held that, a plaintiff seeking initiation of a COP investigation must "submit specific and objective evidence that particular producers were selling below cost in their home markets." *Id.* at ____, 772 F. Supp. at 1288. *Cf. Monsanto Co. v. United States*, 12 CIT 949, 952–53, 698 F. Supp. 285, 288–89 (1988) (cost investigations for different producers considered separately). The court adheres to its opinion in *Torrington II* and finds that Commerce applied the correct standard in deciding to rescind the COP probes in this case. Moreover, Torrington's admitted lack of company-specific data supports Commerce's decision.

After revoking the COP investigations, the ITA afforded Torrington the opportunity to submit revised cost allegations which would satisfy the statutory and judicial standards, and which could result in a reopening of the COP inquiries. GAR (Pub.) Doc. 164 at 2–3. Petitioner submitted additional data within the ITA's stated deadline and Commerce reactivated the investigations pertaining to ball bearings manufactured by SKF, FAG and GMN, spherical roller bearings made by FAG, cylindrical roller bearings produced by SKF, INA and FAG and needle roller bearings manufactured by SKF and FAG. *Preliminary Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany* ("Preliminary Determinations"), 53 Fed. Reg. 45,353, 45,355 (1988).

Commerce did not revive the investigations of ball bearings and needle roller bearings made by INA because, after correcting some methodological errors made by Torrington, the ITA found those sales to be at prices *above* the cost of production. *See* GAR (Pub.) Doc. 338. It seems Torrington's estimates of INA's costs were based on Torrington's own

costs plus INA's actual general, sales and administrative ("GS & A") expenses. However, Torrington failed to separate INA's direct selling expenses from their GS & A expenses. *Id.* Hence, the estimated total cost of production was improperly inflated. To correct this miscalculation, Commerce adjusted the GS & A expenses downward and then "compared costs net GS & A to home market prices less all movement charges, as well as all direct and indirect selling expenses claimed by respondents." GAR (Pub.) Doc. 338. After the adjustment, the ITA found that, as to INA's German sales, "virtually all ball bearings and needle roller bearings were sold at prices *above* the cost of production." 54 Fed. Reg. at 19,019. Consequently, Commerce found that there were no grounds to believe or suspect sales were below cost and the COP investigations as to INA's sales of ball bearings and needle roller bearings were not reinstated.

Plaintiff finds fault with this methodology in two ways. First, Torrington claims that the exclusion of GS & A expenses from cost of production was contrary to agency practice, as upheld by this court. *See Timken Co. v. United States*, 11 CIT 786, 811, 673 F. Supp. 495, 518 (1987). The *Timken* opinion states that GS & A expenses may properly be included in the calculations of cost. *Id.* Here, the ITA does not claim that GS & A expenses are not a proper factor in cost estimates. Rather, Commerce found that Torrington erred in failing to separate selling expenses from GS & A expenses. Consequently, the ITA separated those expenses itself. That decision was a reasonable exercise of the ITA's discretion under section 773(b) of the Tariff Act.

Second, Torrington alleges that the ITA deducted all GS & A expenses from cost, but deducted only sales expenses and movement charges from the opposite side of the equation, *price*. Thus the estimated cost "was adjusted downward disproportionately" more than was the price, and the ensuing finding that sales were at prices above cost may have been skewed. *Memorandum in Support of Plaintiff Torrington Company's Motion for Partial Judgment Upon an Agency Record* at 111. Plaintiff, however, provides no evidence or indication that this was the case. Since the Department's decision to separate selling expenses from GS & A expenses was reasonable, the adjustment was a lawful exercise of the ITA's discretion and the Court will not disturb that finding.

III. *Scope:*

Lastly, Torrington alleges that the ITA wrongly excluded split pillow block housings manufactured in Germany from the scope of the investigations. Torrington claims that its petition and additional evidence support the inclusion of pillow block housings in the investigations and in the antidumping duty order which followed.

This court has acknowledged that Commerce retains broad discretion to define the scope of an antidumping investigation. *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1046–47, 700 F. Supp. 538, 555 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990); *see also Smith-Corona Group v. United States*, 713 F.2d 1568, 1582 (Fed. Cir. 1983), *cert. de-*

nied, 465 U.S. 1022 (1984); *NTN Bearing Corp. of America v. United States*, 14 CIT ____, ____, 747 F. Supp. 726, 731 (1990). Of course, that discretion must be exercised reasonably and any consequent determination must be supported by substantial evidence in the administrative record. *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986); *Gold Star Co. v. United States*, 12 CIT 707, 708, 692 F. Supp. 1382, 1383 (1988), *aff'd sub nom., Samsung Elec. Co. v. United States*, 873 F.2d 1427 (Fed. Cir. 1989).

When a question arises as to whether a particular product is within or without the scope of an investigation, the ITA first must determine whether the petition covers that product. If the petition is ambiguous, Commerce then examines additional evidence. If the scope is still unclear, Commerce looks to other criteria, including the factors enumerated in *Diversified Products*, 6 CIT at 162, 572 F. Supp. at 889.[2] *See Memorandum of the United States in Opposition to Plaintiffs' Motions for Partial Judgment Upon the Agency Record Regarding Certain Fundamental Issues* ("Defendant's Memorandum") at 62–64.

Torrington's petition, filed on March 31, 1988, described the merchandise in question as

> all ground antifriction bearings and all parts thereof both finished and unfinished with the exception of tapered roller bearings. (Footnote omitted). Included within the scope of this petition are ball bearings, cylindrical roller bearings, spherical roller bearings, spherical plain bearings, needle roller bearings, thrust bearings, tappet bearings, and all mounted bearings such as set screw housed units, bushings, *pillow block units*, flange, cartridge and take-up units and parts including balls, rollers, cages or retainers, cups, shields and seals.

GAR (Pub.) Doc. 1 at 13 (emphasis added). The petition also enumerated various tariff descriptions of antifriction bearings and parts thereof, among which were descriptions for ball or roller bearing pillow block units and their parts. *Id.* at 22.

Indeed, the ITA included pillow blocks in its Notice of Initiation of Investigation, as well as in the preliminary and final determinations. *See* GAR (Pub.) Doc. 11 at 2; *Preliminary Determinations*, 53 Fed. Reg. at 45,361; *Final Determinations*, 54 Fed. Reg. at 18,997. However, Commerce stated in the final determinations that the "'mounted bearings,' such as pillow block units, that are specifically noted in the petition can be clearly distinguished from pillow block *housings* by the presence of the bearing itself." 54 Fed. Reg. at 19,016 (emphasis added). Hence, the housings, which do not incorporate a bearing, were held to be outside the scope of the investigations. *Id.*

Torrington counters that a pillow block housing is a part of a pillow block unit and, therefore, was included within the scope of the petition as one of the "parts thereof." Moreover, the petition specifically encom-

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[2] If the scope determination concerns later developed merchandise, the ITA must use the criteria codified at 19 U.S.C. § 1677j(d)(1).

passed housed bearing units which "include pillow blocks." GAR (Pub.) Doc. 1 at 19. Thus, Torrington finds evidence in the record to conclude that split pillow block housings should have been included within the purview of the investigations as parts of pillow block units.

The Government argues that a pillow block housing is not a part of a pillow block unit. The petition enumerated several parts of antifriction bearings, including "balls, rollers, cages or retainers, cups, shields and seals." GAR (Pub.) Doc. 1 at 13. There was no mention of housings among the listing of parts and the Government concludes, therefore, that parts "necessarily exclude housings in general and 'split pillow block housings' in particular." Defendant's Memorandum at 102.

Commerce's method of analysis as to scope requires first a look at the petition to determine whether the product was meant to be included. The petition herein referred to pillow blocks and to parts thereof, but did not specifically mention pillow block housings among the parts listed. Given this ambiguity, the ITA correctly looked to other evidence in the record to determine if housings, as opposed to housed units, were properly includable. The record indicates that a split pillow block housing consists of two cast iron or steel hemispheres that enclose an antifriction bearing. GAR (Pub.) Doc. 444 at 122, 128. The housing aligns, lubricates and supports the bearing, but is not otherwise attached to it. *Id.* at 130.

Respondent Hugo Finkenrath submitted evidence that pillow block housings were not encompassed by the petition because they do not contain bearings, and are not parts of bearings. GAR (Pub.) Doc. 482 and appendices. Finkenrath also argued that the housings differed from antifriction bearings with respect to the elements listed in *Diversified Products*. *Id.* at 3–8; *see* note 1, *supra*. Petitioner Torrington countered that it produces split pillow block bearings and mounted bearings and that certain housings were products "of concern" to the petitioner. GAR (Pub.) Doc. 444 at 147. However, Torrington did not state that *pillow block housings* were of concern to it, with the possible exception of a line in its submission of March 21, 1989, just days before the issuance of the final determinations, wherein Torrington asserted that antifriction bearing parts "may include housings." GAR (Pub.) Doc. 504 at 3.

In the final determinations, Commerce found that pillow block housings were not subject to the investigations because they were not mentioned in the petition and because "the only factual information which has been provided indicates that pillow block housings are not bearings, they do not contain bearings, and they are not parts or subassemblies of bearings." 54 Fed. Reg. at 19,016. That information includes an abundance of evidence from Finkenrath which distinguished pillow block housings from antifriction bearings and their parts. GAR (Pub.) Doc. 482 and appendices.

The determination as to whether a product is covered by an antidumping investigation is one which the ITA must make with ample deference to the intent of the petition. *Royal Business Machines Inc. v.*

United States, 1 CIT 80, 87, 507 F. Supp. 1007, 1014 (1980), *aff'd*, 69 CCPA 61, 669 F.2d 692 (1982); *Mitsubishi*, 12 CIT at 1046, 700 F. Supp. at 555. However, where, as here, the petition is ambiguous, Commerce must rely on other evidence to make its decision. The evidence in the administrative record is substantial and it supports Commerce's decision to exclude split pillow block housings from the investigations. The fact that Torrington now interprets its submissions to have encompassed implicitly pillow block housings is not sufficient to overturn a supportable scope determination. *See Torrington I*, 14 CIT at ___, 745 F. Supp. at 723.

CONCLUSION

The determination of the ITA to subdivide the petition's description of the class or kind of merchandise to be investigated and to rescind the investigations of the German respondents' costs of production and to exclude split pillow block housings from the scope of the investigations are supported by substantial evidence and are otherwise in accordance with law, and are affirmed.

(Slip Op. 92–22)

BORLEM S.A.-EMPREEDIMENTOS INDUSTRIAIS AND FNV-VEICULOS E EQUIPAMENTOS S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND BUDD CO., DEFENDANT-INTERVENOR

Court No. 87–06–00693

[The Commission's remand results are affirmed; Count II of the Complaint dismissed; final judgment for Plaintiffs.]

(Dated March 3, 1992)

Willkie, Farr & Gallagher, (*Christopher Dunn* and *Daniel L. Porter*) for Plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Assistant General Counsel, United States International Trade Commission (*Wayne Herrington*) for Defendants.

Barnes, Richardson & Colburn, (*James H. Lundquist*, *Matthew T. McGrath*, and *Peter A. Martin*), for Defendant-Intervenor.

OPINION AND ORDER

CARMAN, *Judge:* Plaintiff Borlem S.A.-Empreedimentos Industriais ("Borlem") moves to affirm the remand results of the International Trade Commission ("ITC"), *Tubeless Steel Disc Wheels from Brazil; Determination on Reconsideration of the Commission*, USITC Pub. No. 2448, Inv. No. 731–TA–335 (Final) (Nov. 1991) ("reconsideration determination" or "remand results"), issued in response to this Court's second remand order of June 29, 1989. *Borlem S.A.-Empreedimentos Industriais v. United States*, 13 CIT 535, 718 F. Supp. 41 (1989). Bor-

lem's motion also seeks final judgment in Plaintiffs' favor. The government Defendants also seek an entry of final judgment for Plaintiffs, as well as dismissal of Count II of the Complaint on grounds of mootness.[1]

Although given an opportunity to do so in this proceeding, Defendant-Intervenor, The Budd Company, has neither opposed Borlem's motion nor presented any challenge to the remand results.

The Court's remand order required the ITC, in light of the International Trade Administration's amended final determination, to either reconsider its affirmative threat of material injury finding or explain its reasons for not doing so. *Borlem S.A.-Empreedimentos Industriais*, 13 CIT at 546, 718 F. Supp. at 49.[2] On November 4, 1991, the ITC published its reconsideration determination reversing its original affirmative threat of injury determination, in effect making Borlem the prevailing party.

The Court retained jurisdiction over the action during the pendency of the ITC's remand proceeding. No party has expressed any opposition to Borlem's position that the ITC fully complied with this Court's remand order and that the ITC's reconsideration determination is based upon substantial evidence on the record and is otherwise in accordance with law. Defendants explicitly concede those two points. Defendants' Reply to Motion for Affirmation of Remand Results and Entry of Final Judgment at 3.

The Court finds that the ITC complied with the Court's remand instructions and reached a determination that is supported by substantial evidence on the record and is otherwise in accordance with law. Accordingly, this Court affirms the ITC's remand results and directs final judgment be entered for Plaintiffs. Count II of the Complaint is dismissed as moot.

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[1] Borlem does not oppose the dismissal of Count II of the Complaint.

[2] The Court's remand order was affirmed by the Court of Appeals for the Federal Circuit. *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933 (Fed. Cir. 1990).

ABSTRACTED CLASS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSI
C92/15 3/2/92 Carman, J.	Daewoo Int'l (America) Corp.	90-10-00555	6202.93. 6204.6 6201.9 6201.1 6203.4 Variou
C92/16 3/2/92 Carman, J.	Daewoo Int'l (America) Corp.	90-12-00705 S1	6202.93. 6204.6 6201.9 6201.1 6203.4 Variou
C92/17 3/2/92 Carman, J.	Daewoo Int'l (America) Corp.	90-4-00246 S1	6202.93. 6204.6 6201.9 6201.1 6203.4 Variou
C92/18 3/2/92 Aquilino, J.	E. Gluck Corp.	90-10-00538	716.09- 715.05 Variou
C92/19 3/2/92 Aquilino, J.	E. Gluck Corp.	90-11-00581	716.09- 715.05 Variou

SSIFICATION DECISIONS

SESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
3.5010, .63.3510, .93.3510, .13.4030, .43.4010 ous rates	6211.43.0040, 6211.43.0050, 6211.33.0030, 6211.33.0035 Various rates	Daewoo Int'l (America) Corp. *v.* U.S., Ct. No. 90–10–00556	Los Angeles Men's, women's, Jr. boy's & toddler's track suits
3.5010, .63.3510, .93.3510, .13.4030, .43.4010 ous rates	6211.43.0040, 6211.43.0050, 6211.33.0030, 6211.33.0035 Various rates	Daewoo Int'l (America) Corp. *v.* U.S., Ct. No. 90–10–00556	Los Angeles Men's, women's, Jr. boy's & toddler's track suits
3.5010, .63.3510, .93.3510, .13.4030, .43.4010 ous rates	6211.43.0040, 6211.43.0050, 6211.33.0030, 6211.33.0035 Various rates	Daewoo Int'l (America) Corp. *v.* U.S., Ct. No. 90–10–00556	Los Angeles Men's, women's, Jr. boy's & toddler's track suits
–716.45, 05, etc. ous rates	688.40, 688.45, 688.43, 688.42 etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
–716.45, 05, etc. ous rates	688.40, 688.45, 688.43, 688.42 etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C92/20 3/2/92 Aquilino, J.	E. Gluck Corp.	91-4-00250	716.09-716.45, 715.05, etc. Various rates
C92/21 3/2/92 Carman, J.	Olympus Corp.	91-4-00287	708.93 9%

N DECISIONS–Continued

D	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
, es	688.40, 688.45, 688.43, 688.42 etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
	676.54 Free of duty	Agreed statement of facts	New York "Olympus 2 Dimensional Actuator Model 'TAOHSPD' without FPPS Sensor

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